

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

LANCE L. BADY,

**Plaintiff,**

No. C12-5930 RJB/KLS

V.

JUDGE BRIAN TOLLEFSON,

## Defendant.

**ORDER TO AMEND OR SHOW CAUSE**

This matter has been referred to Magistrate Judge Karen L. Strombom pursuant to 28

U.S.C. § 636(b)(1), Local Rules MJR 3 and 4. Plaintiff has been granted leave to proceed *in forma pauperis*. Presently before the Court for review is Plaintiff's proposed civil rights complaint. ECF No. 4. The Court will not direct service of Plaintiff's complaint at this time because it is deficient, as is explained in further detail below. Plaintiff will be given an opportunity to amend his complaint.

## DISCUSSION

Under the Prison Litigation Reform Act of 1995, the Court is required to screen complaints brought by prisoners seeking relief against a governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). The court must dismiss a complaint or portion thereof if the prisoner has raised claims that are legally “frivolous or malicious,” that fail to state a claim upon which relief may be granted, or that seek monetary relief from a defendant who is immune from such relief. 28 U.S.C. §§ 1915A(b)(1), (2) and 1915(e)(2); See *Barren v. Harrington*, 152 F.3d 1193 (9th Cir. 1998).

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A complaint is legally frivolous when it lacks an arguable basis in law or fact. *Neitzke v. Williams*, 490 U.S. 319, 325 (1989); *Franklin v. Murphy*, 745 F.2d 1221, 1227-28 (9th Cir. 1984). The court may, therefore, dismiss a claim as frivolous where it is based on an indisputably meritless legal theory or where the factual contentions are clearly baseless. *Neitzke*, 490 U.S. at 327. A complaint or portion thereof, will be dismissed for failure to state a claim upon which relief may be granted if it appears the “[f]actual allegations . . . [fail to] raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true.” See *Bell Atlantic, Corp. v. Twombly*, 127 S.Ct. 1955, 1965 (2007) (citations omitted). In other words, failure to present enough facts to state a claim for relief that is plausible on the face of the complaint will subject that complaint to dismissal. *Id.* at 1974.

Although complaints are to be liberally construed in a plaintiff’s favor, conclusory allegations of the law, unsupported conclusions, and unwarranted inferences need not be accepted as true. *Jenkins v. McKeithen*, 395 U.S. 411, 421 (1969). Neither can the court supply essential facts that an inmate has failed to plead. *Pena*, 976 F.2d at 471 (quoting *Ivey v. Board of Regents of Univ. of Alaska*, 673 F.2d 266, 268 (9th Cir. 1982)). Unless it is absolutely clear that amendment would be futile, however, a pro se litigant must be given the opportunity to amend his complaint to correct any deficiencies. *Noll v. Carlson*, 809 F.2d 1446, 1448 (9th Cir. 1987).

Under Rule 8(a)(2) of the Federal Rules of Civil Procedure, “the complaint [must provide] ‘the defendant fair notice of what the plaintiff’s claim is and the ground upon which it rests.’” *Kimes v. Stone* 84 F.3d 1121, 1129 (9th Cir. 1996) (citations omitted). In addition, in order to obtain relief against a defendant under 42 U.S.C. § 1983, a plaintiff must prove that the particular defendant has caused or personally participated in causing the deprivation of a particular protected constitutional right. *Arnold v. IBM*, 637 F.2d 1350, 1355 (9th Cir. 1981).

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1 To be liable for “causing” the deprivation of a constitutional right, the particular defendant must  
 2 commit an affirmative act, or omit to perform an act, that he or she is legally required to do, and  
 3 which causes the plaintiff’s deprivation. *Johnson v. Duffy*, 588 F.2d 740, 743 (9th Cir. 1978).

4 Plaintiff purports to sue Judge Brian Tollefson for failing to transfer his criminal case  
 5 from Pierce County Superior Court to an “Ecclesiastical Court.” ECF No. 4.

6 Plaintiff brings this action under 42 U.S.C. § 1983. To state a claim under 42 U.S.C. §  
 7 1983, a complaint must allege: (i) the conduct complained of was committed by a person acting  
 8 under color of state law and (ii) the conduct deprived a person of a right, privilege, or immunity  
 9 secured by the Constitution or laws of the United States. *Parratt v. Taylor*, 451 U.S. 527, 535,  
 10 101 S.Ct. 1908, 687 L.Ed.2d 420 (1981), *overruled on other grounds*, *Daniels v. Williams*, 474  
 11 U.S. 327 (1986). Section 1983 is the appropriate avenue to remedy an alleged wrong only if  
 12 both of these elements are present. *Haygood v. Younger*, 769 F.2d 1350, 1354 (9th Cir. 1985).

13 Plaintiff’s complaint fails to state a cognizable claim under § 1983. First, he has not  
 14 named a proper defendant. Judges are absolutely immune from liability for damages in civil  
 15 rights suits for judicial acts performed within their subject matter jurisdiction. *Stump v.*  
 16 *Sparkman*, 435 U.S. 349, 356 (1978); *Ashelman v. Pope*, 793 F.2d 1072, 1075 (9th Cir. 1986)  
 17 (en banc); *Schucker v. Rockwood*, 846 F.2d 1202, 1204 (9th Cir. 1988) (per curiam).

18 Even if Plaintiff were granted leave to amend his complaint to name a proper defendant,  
 19 the lawsuit here could not proceed because Plaintiff is attempting to challenge the propriety of  
 20 ongoing proceedings in Pierce County Superior Court. Generally, federal courts will not  
 21 intervene in a pending criminal proceeding absent extraordinary circumstances where the danger  
 22 of irreparable harm is both great and immediate. See *Younger v. Harris*, 401 U.S. 37, 45 46  
 23 (1971); see also *Fort Belknap Indian Community v. Mazurek*, 43 F.3d 428, 431 (9th Cir.1994),

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1 cert. denied, 116 S.Ct. 49 (1995) (abstention appropriate if ongoing state judicial proceedings  
2 implicate important state interests and offer adequate opportunity to litigate federal constitutional  
3 issues); *World Famous Drinking Emporium v. City of Tempe*, 820 F.2d 1079, 1082 (9th  
4 Cir.1987)(Younger abstention doctrine applies when the following three conditions exist: (1)  
5 ongoing state judicial proceeding; (2) implication of an important state interest in the proceeding;  
6 and (3) an adequate opportunity to raise federal questions in the proceedings).

7 Only in the most unusual circumstances is a petitioner entitled to have the federal court  
8 intervene by way of injunction or habeas corpus before the jury comes in, judgment has been  
9 appealed from and the case concluded in the state courts. *Drury v. Cox*, 457 F.2d 764, 764 65  
10 (9th Cir.1972). See *Carden v. Montana*, 626 F.2d 82, 83 84 (9th Cir.), *cert. denied*, 449 U.S.  
11 1014 (1980). Extraordinary circumstances exist where irreparable injury is both great and  
12 immediate, for example where the state law is flagrantly and patently violative of express  
13 constitutional prohibitions or where there is a showing of bad faith, harassment, or other unusual  
14 circumstances that would call for equitable relief. *Younger*, 401 U.S. at 46, 53-54.

15 There are no extraordinary circumstances here warranting intervention by this Court in  
16 any ongoing state proceeding and, therefore, Plaintiff's claims are not cognizable under 42  
17 U.S.C. § 1983.

18 Due to the deficiencies described above, the Court will not serve the complaint. Plaintiff  
19 may file an amended complaint curing, if possible, the above noted deficiencies, or show cause  
20 explaining why this matter should not be dismissed. If Plaintiff chooses to amend his complaint,  
21 he must demonstrate how the conditions complained of have resulted in a deprivation of his  
22 constitutional rights. The complaint must allege in specific terms how each named defendant is  
23 involved. The amended complaint must set forth all of Plaintiff's factual claims, causes of  
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1 action, and claims for relief. Plaintiff shall set forth his factual allegations **in separately  
2 numbered paragraphs** and shall allege with specificity the following:

3 (1) the names of the persons who caused or personally participated in causing the  
4 alleged deprivation of his constitutional rights;

5 (2) the dates on which the conduct of each Defendant allegedly took place; and

6 (3) the specific conduct or action Plaintiff alleges is unconstitutional.

7 The amended complaint will operate as a complete substitute to the present complaint.  
8 Therefore, reference to a prior pleading or another document is unacceptable – once Plaintiff  
9 files an amended complaint, the original pleading or pleadings will no longer serve any function  
10 in this case.

11 Plaintiff shall present his complaint on the form provided by the Court. The amended  
12 complaint must be **legibly rewritten or retyped in its entirety**, it should be an original and not a  
13 copy, it may not incorporate any part of the original complaint by reference, and it must be  
14 clearly labeled the “Amended Complaint” and must contain the same cause number as this case.  
15 Plaintiff should complete all sections of the court’s form. Plaintiff may attach continuation  
16 pages as needed but may not attach a separate document that purports to be his amended  
17 complaint. **Plaintiff is advised that he should make a short and plain statement of claims  
18 against the defendants. He may do so by listing his complaints in separately numbered  
19 paragraphs. He should include facts explaining how each defendant was involved in the  
20 denial of his rights.**

21 The Court will screen the amended complaint to determine whether it contains factual  
22 allegations linking each defendant to the alleged violations of Plaintiff's rights. The Court will  
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1 not authorize service of the amended complaint on any Defendant who is not specifically linked  
2 to the violation of Plaintiff's rights.

3 If Plaintiff decides to file an amended civil rights complaint in this action, he is cautioned  
4 that if the amended complaint is not timely filed or if he fails to adequately address the issues  
5 raised herein on or before **November 30, 2012**, the Court **will recommend dismissal of this**  
6 **action as frivolous pursuant to 28 U.S.C. § 1915 and the dismissal will count as a “strike”**  
7 **under 28 U.S.C. § 1915(g)**. Pursuant to 28 U.S.C. § 1915(g), enacted April 26, 1996, a prisoner  
8 who brings three or more civil actions or appeals which are dismissed on grounds they are  
9 legally frivolous, malicious, or fail to state a claim, will be precluded from bringing any other  
10 civil action or appeal in forma pauperis “unless the prisoner is under imminent danger of serious  
11 physical injury.” 28 U.S.C. § 1915(g).

12       **The Clerk is directed to send Plaintiff the appropriate forms for filing a 42 U.S.C.**  
13       **1983 civil rights complaint and for service. The Clerk is further directed to send a copy of**  
14       **this Order and a copy of the General Order to Plaintiff.**

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16       **DATED** this 2nd day of November, 2012.

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22       Karen L. Strombom  
23       Karen L. Strombom  
24       United States Magistrate Judge  
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